Office-Supreme Court, U.S.
FILED
MAY 6 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-818 and 82-852

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Whether a bankruptcy court, in reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.*, may authorize a debtor-in-possession to reject a collective bargaining agreement without a threshold showing that the business is likely to fail unless the agreement is rejected.

2. Whether a debtor-in-possession must comply with the bargaining requirements for midterm contract modification contained in Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), before obtaining authorization to reject a collective bargaining agreement from a bankruptcy court.

3. Whether the National Labor Relations Board may properly find that a debtor-in-possession violates Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by unilaterally changing the terms of a collective bargaining agreement during the period between filing of a Chapter 11 petition and entry of a court order authorizing rejection of the agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 682 F.2d 72. The decision and order of the National Labor Relations Board (Pet. App. 29a-43a) is reported at 255 N.L.R.B. 1203. The oral opinions of the district court (Pet. App. 44a-48a) and the bankruptcy court (J.A. 56-77) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-28a) was entered on June 17, 1982. Pursuant to orders entered by Justice Brennan on September 3, 1982, and October 5, 1982, the time for filing a petition for a writ of certiorari was extended to and including November 14, 1982. The petitions were timely filed and were granted on January 17, 1983 (J.A. 116-117). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the National Labor Relations Act ("NLRA"), 29 U.S.C. (& Supp. V) 152, provides in pertinent part:

When used in this subchapter—

> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-818; "J.A." refers to the joint appendix prepared for Nos. 82-818 and 82-852 pursuant to Rule 30.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

Section 8 of the National Labor Relations Act, 29 U.S.C. 158, provides in pertinent part:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees * * *.

* * * * *

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

Section 365 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365, provides in pertinent part:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> * * * * *
>
> (g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—
>
> > (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition * * *.

STATEMENT

1. Bildisco is a New Jersey partnership that sells and distributes building supply materials. Some of its employees are represented by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"). The most recent collective bargaining agreement between Bildisco and the Union was effective from May 1, 1979, through April 30, 1982 (Pet. App. 35a). Beginning in January 1980, Bildisco failed to meet certain obligations under the agreement, including payment of pension, health, and welfare contributions, payment of vacation benefits, and remittance to the Union of dues withheld from employees' pay. Beginning in May 1980, it refused to grant wage in-

creases provided for in the agreement (*ibid.*). On April 14, 1980, Bildisco filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.* (Pet. App. 2a; J.A. 40-54). After that date Bildisco operated its business as debtor-in-possession (Pet. App. 2a). During the summer the Union filed unfair labor practice charges with the National Labor Relations Board, and on July 31, 1980, the Board's General Counsel issued a complaint alleging that Bildisco had violated Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(5) and (a)(1), by unilaterally changing the terms of the collective bargaining agreement (Pet. App. 4a-5a; J.A. 3-7).

In December 1980, Bildisco filed a motion with the bankruptcy court requesting permission to reject the collective bargaining agreement with the Union (J.A. 55). At the hearing on Bildisco's motion on January 5, 1981, the only witness was Sal Valente, a general partner of Bildisco. Valente testified that Bildisco's creditors were very concerned about the "union situation" at Bildisco and that if Bildisco could operate "non-union" it could save around $100,000 in wages and fringe benefits in 1981 (Pet. App. 3a; J.A. 59-61).[2] According to Valente, this projected savings would make "a considerable difference in [Bildisco's] potential profit for 1981" (Pet. App. 30a; J.A. 60).[3]

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[2] The cost savings that Valente projected were based on the assumption of 10 employees in bargaining unit positions, although at the time of the hearing Bildisco was operating with only three employees in such positions (Pet. App. 3a & n.2; J.A. 61-62, 63).

[3] Valente's testimony that Bildisco's projected profit was $100,000 was unsupported by any evidence. The bankruptcy

On January 15, 1981, the bankruptcy court issued an order granting Bildisco's motion to reject the agreement (Pet. App. 50a). The Union was given 30 days to file a claim for damages resulting from the rejection (Pet. App. 50a; J.A. 77). The district court upheld the bankruptcy court's order (Pet. App. 44a-49a).

2. During the same period the Board was processing the unfair labor practice complaint against Bildisco. Despite repeated warnings from Board staff, Bildisco failed to file an answer to the complaint. On April 23, 1981, the Board granted the General Counsel's motion for summary judgment against Bildisco. The Board concluded that, since Bildisco had not shown good cause for failing to file a timely answer,[4] the allegations in the complaint should be deemed admitted (Pet. App. 30a-33a, 41a). The Board found that Bildisco, as a debtor-in-possession in reorganization proceedings, was an alter ego of the pre-bankrupt company and an "employer" within the meaning of the NLRA, and that it had violated Section 8(a)(5) and (a)(1) of the Act by unilaterally changing the terms of the collective bargaining agreement (Pet. App. 33a-35a). The Board ordered Bildisco, *inter alia*, to cease and desist from refusing to bargain with the Union and to make the various payments and re-

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court sustained an objection to counsel's conclusion that this projection meant that the savings incurred by rejection would make "a difference between a profit and loss," and that line of questioning was not pursued further (J.A. 60-61).

[4] The complaint against Bildisco was issued on July 31, 1980; an amended complaint was filed on October 8, 1980 (J.A. 3-13). Under the Board's rules, 29 C.F.R. 102.20, an answer is due within 10 days of service of a complaint. Bildisco finally filed an answer on May 20, 1981, almost a month after the Board had issued its decision and order (J.A. 35-37).

mittance of dues required by the agreement (*id.* at 38a-41a).

3. The Union's appeal from the district court's order affirming the bankruptcy court's approval of rejection and the Board's application for enforcement of its order were consolidated in the court of appeals (Pet. App. 6a-7a).[5]

a. The court of appeals held first that a collective bargaining agreement is an executory contract within the meaning of Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), and thus is subject to rejection by a debtor-in-possession (Pet. App. 10a-11a). The court also concluded that a debtor-in-possession is not bound by the restrictions on mid-term contract modification contained in Section 8(d) of the NLRA, 29 U.S.C. 158(d) (Pet. App. 12a, 21a-22a). However, the court recognized that the usual test for rejection of executory contracts, *i.e.*, whether rejection would benefit the estate (the "business judgment" test), should not be applied, since the "impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress * * * require a more stringent examination of the evidence offered to justify rejection of such a contract" (*id.* at 12a). The court accepted the conclusion of the Second Circuit in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 707 (1975) (quoting *In re Overseas National Airways, Inc.*, 238 F. Supp. 359, 361 (E.D.N.Y. 1965)), that, in light of the competing statutory policies, rejection of a collective bargaining agreement requires " 'thorough scrutiny, and

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[5] The Board intervened in the Union's appeal, and the Union intervened in the Board's application for enforcement.

a careful balancing of the equities on both sides' " (Pet. App. 12a-13a).

However, the court declined to accept the Second Circuit's subsequent ruling in *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 172, cert. denied, 423 U.S. 1017 (1975), that in order to accommodate the policy underlying the national labor laws, rejection of a collective bargaining agreement should be permitted only in cases in which it could be shown that the company would collapse and the employees would lose their jobs unless the agreement was rejected. The court declined to follow this "more stringent test" because it believed that it might be impossible to predict the success of a reorganization until very late in the proceedings and that the test unduly exalted perpetuation of the agreement over "the more pragmatic consideration of whether the employees will continue to have jobs at all" (Pet. App. 14a-15a). The court instead fashioned its own standard, under which the debtor-in-possession must first demonstrate that continuation of the collective bargaining agreement would be burdensome to the estate and the bankruptcy court must then weigh the competing equities, with particular attention to doing equity between claims arising under the agreement and other claims against the debtor (*id.* at 17a). The court vacated the district court judgment and remanded for reconsideration in light of the test it had articulated (*id.* at 20a).

b. The court of appeals refused to enforce the Board's order. It concluded that the Board's finding that Bildisco had violated Section 8(a)(5) and (a)(1) of the NLRA was premised on the view that the debtor-in-possession is an alter ego of the debtor and thus a party to the collective bargaining agreement (Pet. App. 21a). The court rejected that prem-

ise, citing the conclusion of the Second Circuit in *Kevin Steel*, *supra*, 519 F.2d at 704, that the debtor-in-possession is a " 'new entity * * * created with its own rights and duties, subject to the supervision of the bankruptcy court' " (Pet. App. 21a-22a).

The court further concluded that rejection of the agreement related back to the day before the Chapter 11 petition was filed, citing 11 U.S.C. (Supp. V) 365(g)(1), and that this meant that in effect no labor contract existed between the union and the debtor-in-possession subsequent to April 14, 1980 (Pet. App. 24a-25a). The court stated that the rejection did not affect obligations that had arisen prior to the date of the petition, so that the Board would not be precluded from finding an unfair labor practice and imposing monetary relief based on Bildisco's pre-petition conduct (*id.* at 25a-26a). The court remanded so that the Board could separate pre-petition conduct from post-petition conduct. The court stated that if on remand the bankruptcy court again permitted rejection of the collective bargaining agreement the Board would be bound by that determination and thus precluded from finding any unfair labor practice based on failure to meet obligations under the agreement in the post-petition period (*ibid.*).

SUMMARY OF ARGUMENT

This case involves rejection of a collective bargaining agreement by a debtor-in-possession in a bankruptcy proceeding—a situation that involves the competing policies of the labor laws and the bankruptcy laws. The standard for rejection established by the court below does not constitute an adequate accommodation of the two competing statutory policies, since it seriously undermines the collective bargain-

ing and employee interests protected by the national labor policy. In addition, the court below erred in restricting the Board's ability to remedy unfair labor practices committed by a debtor-in-possession in the period between filing of a bankruptcy petition and court approval of rejection of a collective bargaining agreement.

1. a. Under Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), a party to a collective bargaining agreement violates the Act if it attempts to terminate or modify the agreement in midterm without the consent of the other party and without following specified procedures. However, Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), provides that a debtor-in-possession may reject executory contracts following approval by the bankruptcy court. Collective bargaining agreements are not expressly excluded from the class of executory contracts that may be rejected. In view of this direct conflict between the terms of the labor laws and the bankruptcy laws, the two statutes should be interpreted in a manner that will give maximum possible effect to each. In particular, the accommodation must give meaningful effect to the important concerns of the national labor policy.

b. A proper accommodation of the labor laws and the bankruptcy laws requires that bankruptcy courts apply a stringent standard in determining whether to approve rejection of a collective bargaining agreement. Such a standard is necessary to minimize the impairment of collective bargaining and employee interests protected by the NLRA. Unlike commercial creditors, who generally spread risk among numerous

customers, employees normally are wholly dependent upon their employer for wages and benefits. And, as this Court has recognized, a collective bargaining agreement is different from an ordinary commercial contract, since it governs an entire employment relationship. Rejection of such an agreement leaves the parties without a code of industrial government; in addition, it deprives employees of not only monetary rights, but also important nonmonetary rights for which money damages cannot compensate. Moreover, rejection interferes with the right of the parties to regulate the substantive terms of the employment relationship.

These considerations led the Second Circuit to conclude that it is improper to permit rejection of a collective bargaining agreement merely because rejection would improve the financial status of the debtor. The Second Circuit found that the policies underlying the national labor laws require that a court decline to approve rejection of a collective bargaining agreement unless the debtor can show that absent rejection the company will fail and the employees will lose their jobs and unless a balancing of the equities favors rejection. *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (1975); *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, cert. denied, 423 U.S. 1017 (1975). The Second Circuit standard ensures that collective bargaining agreements are rejected only when necessary to accomplish the bankruptcy policy goal of avoiding collapse of the business, not simply because an employer prefers to operate without the restrictions of the collective bargaining agreement. The Second Circuit standard has been accepted and applied by a number of bankruptcy

and district courts. Congress' reenactment of the provision allowing rejection of executory contracts without substantial change in the 1978 Bankruptcy Code reflects an intent to codify the consistent judicial interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

The court below erred in rejecting the Second Circuit's threshold requirement that a debtor-in-possession demonstrate that the business is likely to fail absent rejection of a collective bargaining agreement and in fashioning a test that permits ready rejection of collective bargaining agreements. The court's test operates to undermine the national labor policy of encouragement of collective bargaining and protection of employee interests. The Eleventh Circuit similarly erred in its recent rejection of the Second Circuit's threshold requirement. *In re Brada Miller Freight System, Inc.*, No. 82-7043 (11th Cir. Apr. 11, 1983), slip op. 2360-2361. The factors the court in *Brada Miller* believed a bankruptcy court should consider are consistent with the balancing of equities that occurs under the Second Circuit's *Kevin Steel-REA Express* standard. However, because the Eleventh Circuit would omit the threshold requirement of a showing of likely failure absent rejection, it accords insufficient weight to the national labor policy.

c. Both the Second Circuit and the court below have suggested that at least some of the requirements of the labor laws can be ignored in the context of bankruptcy proceedings because, in the view of those courts, the debtor-in-possession is a "new entity," different from the debtor and analogous to a successor employer. The "new entity" characterization is unsound because it is internally contradictory; if the debtor-in-possession really is a new

entity, there would be no need for it to obtain rejection of any contract because it could never be bound by the debtor's obligations. The successorship analogy also is unsatisfactory, because the debtor-in-possession actually operates the same business on behalf of the debtor and is not truly distinct from its former self. The situation of the debtor-in-possession is markedly different from that of a true successor employer, which normally has not agreed to assume the collective bargaining agreement.

2. The Union, petitioner in No. 82-852, contends (82-852 Pet. 7-23) that, as a precondition to obtaining rejection of a collective bargaining agreement, the debtor-in-possession must show that it has complied with the bargaining requirements for midterm contract modification contained in Section 8(d) of the NLRA. We believe that a proper accommodation of the labor laws and the bankruptcy laws does not require adherence to Section 8(d) procedures in the context of a bankruptcy proceeding because the resulting delay would be inconsistent with the need for expeditious determination of the need for rejection. However, it is entirely appropriate for the bankruptcy court to encourage the parties to bargain prior to approval of rejection. The union party can be expected to agree to modifications that are necessary to preservation of the business (and thus preservation of jobs). Such a solution, which could avoid loss of important employee rights that do not impair the employer's economic viability, as well as loss of employer rights under the agreement, is far more consistent with the national labor policy than total rejection pursuant to the Bankruptcy Code.

3. The court below erred in concluding that the Board would be precluded from finding that re-

spondent Bildisco committed unfair labor practices in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), by unilaterally changing the terms of the collective bargaining agreement between the dates of filing of the bankruptcy petition and entry of a court order authorizing rejection of the agreement. The court based its conclusion in part on the erroneous view that the debtor-in-possession is a new entity. The court also asserted that rejection of the collective bargaining agreement has a retroactive effect under the terms of 11 U.S.C. (Supp. V) 365(g)(1), which provides that rejection of an executory contract constitutes a breach of the contract as of the date immediately before filing of the petition. However, the legislative history makes clear that the provision cited refers only to the priority of claims for damages based on rejection of the contract, not to the existence of the contract in the post-petition period. Deeming the rejection of a collective bargaining agreement to be retroactive to a date prior to filing of the petition for purposes of determining unfair labor practice liability, which amounts to permitting unilateral action taken prior to the court approval required by the bankruptcy laws, is unnecessary to furtherance of the policies of the bankruptcy laws. In addition, retroactive nullification of a collective bargaining agreement impairs employee interests that are protected by the NLRA, since employees lose benefits for a period during which they believed themselves contractually entitled to receive them. Finally, retroactive nullification seriously impairs the Board's unique ability to protect employees' and employers' collective bargaining rights during reorganization proceedings by issuing orders directed at unfair labor practices committed during this period.

ARGUMENT

I. A PROPER ACCOMMODATION OF THE POLICIES OF THE LABOR LAW AND BANKRUPTCY LAWS REQUIRES THAT A BANKRUPTCY COURT NOT AUTHORIZE REJECTION OF A COLLECTIVE BARGAINING AGREEMENT UNLESS THE DEBTOR-IN-POSSESSION CAN MAKE A THRESHOLD SHOWING THAT THE BUSINESS IS LIKELY TO FAIL ABSENT REJECTION

A. The Competing Policies of the National Labor Relations Act and the Bankruptcy Code Require an Accommodation That Gives Meaningful Effect to the National Labor Policy

As the court below recognized (Pet. App. 7a), rejection of a collective bargaining agreement in a bankruptcy proceeding "implicates a significant confrontation of labor and bankruptcy policies." Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer, including a trustee in reorganization proceedings,[6] to refuse to bargain collectively with the representative of his employees. Section 8(d) of the Act, 29 U.S.C. 158(d), defines the duty to bargain collectively to mean, *inter alia*, that no party to a collective bargaining agreement shall "terminate or modify" it unless that party follows specified procedures.[7] Section 8(d) further

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[6] Section 2(1) of the NLRA, 29 U.S.C. (Supp. V) 152(1), provides that the term "person" includes "trustees in cases under title 11, or receivers"; Section 2(2), 29 U.S.C. 152(2), provides that the term "employer" includes any person acting as an agent of an employer, directly or indirectly.

[7] The required procedures under Section 8(d) include notice to the other party to the agreement and to the Federal Mediation and Conciliation Service, an offer to negotiate a new

provides that no party can be required either to "discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

Accordingly, it is a violation of the NLRA for a party unilaterally to modify or abrogate a collective bargaining agreement. See *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159, 185-186 (1971); *NLRB* v. *Scam Instrument Corp.*, 394 F.2d 884, 887 (7th Cir.), cert. denied, 393 U.S. 980 (1968); *C&S Industries, Inc.*, 158 N.L.R.B. 454, 456-458 (1966).[8] Moreover, violation of the prohibition on unilateral midterm contract modification is not excused by an employer's economic hardship. *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974), cert. denied, 423 U.S. 826 (1975); *Airport Limousine Service*, 231 N.L.R.B. 932, 934 (1977); *Phoenix Air Conditioning, Inc.*, 231 N.L.R.B. 341, 342 & n.6 (1977), enforced, 580 F.2d 1053 (9th Cir. 1978). "The Act permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute." *NLRB* v. *Harris*, 200 F.2d 656, 659 (5th Cir. 1953). The statutory procedures for modification or termination of a collective bargaining agree-

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agreement, and continuation of the agreement for a 60-day period following notice of termination or modification, or until the expiration date of the contract, which occurs later.

[8] Even in the absence of an agreement, an employer violates its bargaining obligation under the Act by unilaterally changing existing conditions of employment during the pendency of contract negotiations. *NLRB* v. *Katz*, 369 U.S. 736 (1962).

ment are designed to "facilitate agreement in place of economic warfare." *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, *supra*, 404 U.S. at 187.

On the other hand, Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), provides that a debtor-in-possession may reject executory contracts following approval by the bankruptcy court.[9] This procedure serves an underlying purpose of the bankruptcy laws, since rejection of burdensome obligations may help a company to return to financial viability. Nothing in the Bankruptcy Code or its history expressly excludes collective bargaining agreements from the class of executory contracts that may be rejected by a debtor-in-possession. Indeed, there is some circumstantial evidence that Congress intended to include collective bargaining agreements within that class.[10]

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[9] Section 365(a) provides in pertinent part that "the trustee, subject to the court's approval, may assume or reject any executory contract * * *." Since a debtor-in-possession may exercise the powers of a trustee (see 11 U.S.C. (Supp. V) 1107), it may apply for permission to reject executory contracts. Section 365(a) applies to both reorganization proceedings under Chapter 11 and liquidation proceedings under Chapter 7 of the Bankruptcy Code. 11 U.S.C. (Supp. V) 103(a).

[10] More than three years before the 1978 enactment of the Bankruptcy Code, the Second Circuit held squarely that a collective bargaining agreement could be rejected as an executory contract pursuant to Section 313(1) of the Bankruptcy Act, 11 U.S.C. 713(1). *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 704-705 (1975); *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 168-169, cert. denied, 423 U.S. 1017 (1975). Congress did not express disagreement with these decisions when it enacted the Bankruptcy Code. It is a fundamental principle of statutory construction that "Congress is presumed to be aware of an administrative or judicial interpretation of

Thus, there is a direct conflict between Section 8(d) of the NLRA, which bars midterm modification

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a statute and to adopt that interpretation when it * * * adopts a new law incorporating sections of a prior law." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). See also *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

In addition, Section 1167 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1167, which relates to railroad reorganizations, provides:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

As the court below observed (Pet. App. 11a), "[Section 1167] * * * permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general." The Bankruptcy Act included a similar provision for railroad reorganizations. See 11 U.S.C. 205(n); *Kevin Steel*, *supra*, 519 F.2d at 702.

Finally, the legislative history of Section 82 of the Bankruptcy Act, Pub. L. No. 94-260, 90 Stat. 316, 11 U.S.C. 402, which permitted rejection of executory contracts of municipalities in Chapter IX proceedings, also supports this inference. In discussing Section 82, the Senate Report states that "all continuing obligations of the petitioner will be considered executory contracts, including collective bargaining agreements." S. Rep. No. 94-458, 94th Cong., 1st Sess. 15 (1975). See also H.R. Rep. No. 94-686, 94th Cong., 1st Sess. 8-9 (1975). The House Report cites *Kevin Steel* and *REA Express* as support for the proposition that a petitioner seeking to reject a collective bargaining agreement must make a greater showing than that necessary for the rejection of an ordinary commercial contract. H.R. Rep. No. 94-686, *supra*, at 17-18. See also 122 Cong. Rec. 7972 (1976). Section 82 was repealed in 1978 by the Bankruptcy Code, but Section 365 of the Code, which provides for the rejection of executory contracts generally, applies to municipal bankruptcies. 11 U.S.C. (Supp. V) 901.

or termination of a collective bargaining agreement without the consent of both parties to the agreement, and Section 365 of the Bankruptcy Code, which empowers a bankruptcy court to permit a debtor-in-possession to reject such an agreement over the opposition of the union party. In such circumstances, the two statutes should be interpreted in a manner that gives the maximum possible effect to both. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). In particular, the accommodation must give meaningful effect to the important concerns of the national labor policy. Thus, rejection of a collective bargaining agreement in a bankruptcy proceeding should be authorized only pursuant to safeguards designed to afford the maximum possible protection to collective bargaining interests of employees.

B. A Stringent Standard for Rejection of a Collective Bargaining Agreement in a Bankruptcy Proceeding Is Required in Order to Minimize the Impairment of Employee Interests and the Policies of the NLRA That Results From Such Rejection

It is essential that there be a stringent standard for rejection of a collective bargaining agreement in a bankruptcy proceeding in order to give appropriate recognition to the policies of the NLRA. Those policies include encouragement of collective bargaining and protection of employee interests, both of which may be seriously impaired as a result of rejection. The Second Circuit has achieved an accommodation between the labor laws and the bankruptcy laws that gives appropriate recognition to the former by requiring a threshold showing that a business is likely to fail absent rejection. Congress implicitly approved that accommodation when it enacted the Bankruptcy

Code in 1978. The court below, as well as the Eleventh Circuit in a more recent case, erred in rejecting the Second Circuit accommodation, thereby giving inadequate recognition to the significant concerns underlying the national labor policy.

1. In considering the proper standard for rejection of a collective bargaining agreement, it is necessary to consider the special nature of such an agreement. As this Court has recognized, "a collective bargaining agreement is not an ordinary contract." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550 (1964). See generally Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956). Rather, "it is a generalized code to govern * * * the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960) (footnote omitted). Thus, rejection of a collective bargaining agreement leaves the parties—both employer and employees—without a code of industrial government under which to operate, a situation that is not conducive to labor peace.

Moreover, a collective bargaining agreement normally provides employees with many nonmonetary rights, such as seniority rights, pension rights, grievance and arbitration procedures, and no strike/no lockout clauses; these rights, along with any monetary benefits, are wiped out when the agreement is rejected. While the debtor's rejection of a contract constitutes a breach (see 11 U.S.C. (Supp. V) 365(g)) for which money damages may be awarded, such damages are clearly inadequate to compensate employees for loss of nonmonetary rights

contained in a collective bargaining agreement. See *Kevin Steel, supra*, 519 F.2d at 707. Even the monetary terms of the agreement, such as wages and benefits, stand on a different footing from the claims of commercial creditors whose contracts have been rejected. While such creditors generally spread risk among numerous customers, employees normally are wholly dependent on their employer for wages and benefits. Upon a debtor's breach, employees, unlike commercial creditors, may be unable to mitigate their losses by ceasing performance, for it may be impossible for them to obtain other employment. The breach that results from rejection of a collective bargaining agreement allows employees to cease work and strike. See *In re Petrusch*, 667 F.2d 297, 298-300 (2d Cir. 1981), cert. denied, 456 U.S. 974 (1982); *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 317-318 (2d Cir. 1976). However, it serves the policies of neither the bankruptcy laws nor the labor laws to structure relations so that employees must strike in order to protect contractual terms of employment.

Finally, it is a basic policy of the NLRA that "the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 488 (1960). Accord: *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970). When a bankruptcy court permits a debtor to reject a collective bargaining agreement it negotiated with the representative of its employees, it effectively regulates the substantive terms of the employment relationship over the objections of one of the parties. In authorizing rejection of the agreement, the court determines that the terms and conditions of employment

negotiated by the parties are unduly burdensome, and, as a practical matter, sets the course of the future negotiations.[11]

2. Such considerations led the Second Circuit to conclude in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (1975), that the decision whether to allow rejection of labor agreements should not be based solely on whether rejection would improve the financial status of the debtor (the usual test for rejection of executory commercial contracts in a bankruptcy proceeding),[12] because such a narrow approach "totally ignores the policies of the Labor Act and makes no attempt to accommodate to them" (*id.* at 707). Rather, a bankruptcy court should permit rejection of a collective bargaining agreement "only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under

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[11] Although the court of appeals noted (Pet. App. 16a) that the debtor-in-possession remains obligated to bargain with the incumbent union following rejection of a collective bargaining agreement, post-rejection bargaining is no substitute for pre-rejection bargaining. For example, if the debtor-in-possession has obtained rejection of the agreement on the ground that its survival requires wages to be reduced by a certain percentage, as a realistic matter effective bargaining on that matter has been preempted. In recognition of the fact that bargaining before and after an event are very different, the Board, with court approval, generally requires an employer that has violated the NLRA by making a unilateral change in conditions of employment to restore the status quo ante before bargaining with the union. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964).

[12] The test used to determine whether a bankruptcy trustee may reject an ordinary commercial contract is referred to as the "business judgment" test. 2 *Collier on Bankruptcy* ¶ 365.03, at 365-14 (L. King 15th ed. 1982).

a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages" (*ibid.*, quoting *In re Overseas National Airways, Inc.*, 238 F. Supp. 359, 361-362 (E.D.N.Y. 1965)). Approximately a month after its decision in *Kevin Steel*, the Second Circuit, in applying the *Kevin Steel* principles to agreements of non-railroad employees subject to the Railway Labor Act, held that, in view of the serious effects rejection has on employees, it should be permitted "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the [company] will collapse and the employees will no longer have their jobs." *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 172 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

The *Kevin Steel-REA Express* standard ensures that collective bargaining agreements are rejected only when that step is demonstrably necessary to accomplish the bankruptcy policy goal of creating conditions that will forestall collapse of the business, and not merely when those responsible for the reorganization would prefer to operate without the restrictions of the collective bargaining agreement. That standard has been accepted and applied by a number of bankruptcy and district courts.[13] More-

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[13] See, *e.g.*, *In re Miles Machinery*, No. 81-00388 (Bankr. E.D. Mich. June 17, 1982), slip op. 4-5 (rejection disallowed); *In re David A. Rosow, Inc.*, 9 Bankr. 190, 191-193 (Bankr. D.Conn. 1981) (same); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847, 2851-2853 (Bankr. D. Conn. 1980) (same); *In re Studio Eight Lighting, Inc.*, 91 L.R.R.M. (BNA) 2429, 2430 (E.D.N.Y. 1976) (same). Compare *In re*

over, it is the standard Congress has implicitly approved. There can be no doubt that Congress was aware of the Second Circuit standard at the time it enacted the new Bankruptcy Code in 1978, since it had referred to it as an established standard—citing both *Kevin Steel* and *REA Express*—when it amended the Bankruptcy Act several years before. See H.R. Rep. No. 94-686, 94th Cong., 1st Sess. 17-18 (1975); page 19 note 10, *supra*. See also *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress' reenactment of the provision permitting rejection of executory contracts without significant change indicates an intent to codify the consistent judicial interpretation. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 580; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951). Thus, Congress has approved the accommodation of the labor laws and the bankruptcy laws that is reflected in the Second Circuit's requirement of a threshold showing that the business is likely to fail unless the collective bargaining agreement is re-

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Brada Miller Freight System, Inc., 16 Bankr. 1002 (N.D. Ala. 1981), vacated and remanded, No. 82-7043 (11th Cir. Apr. 11, 1983) (rejection allowed); *In re Allied Technology, Inc.*, 8 Bankr. 366 (Bankr. S.D. Ohio 1980) (rejection allowed when business had ceased operating and generating revenue); *In re Alan Wood Steel Co.*, 449 F. Supp. 165, 169-170 (E.D. Pa. 1978) (same); *In re Penn Fruit Co.*, 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976) (rejection allowed where no possibility existed of saving jobs of employees). Until the decision below, no court of appeals other than the Second Circuit had specifically addressed the proper standard for rejection of a labor contract. Cf. *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 213-214 n.2 (9th Cir. 1980) (finding it unnecessary to address the question whether the bankruptcy court "should apply a stricter standard for authorizing the rejection of collective bargaining agreements as a means of reconciling the policies of the labor and bankruptcy laws").

jected. The court below accordingly erred in rejecting (Pet. App. 13a-14a) the aspect of the congressionally approved Second Circuit standard articulated in *REA Express*.

The requirement of a threshold showing that the business is likely to fail absent rejection is of considerable importance in giving effect to the national labor policy, since it ensures that rejection will occur only for reasons of real economic necessity.[14] Moreover such a requirement enables employers, unions, and employees to predict with greater certainty whether a collective bargaining agreement is likely to be rejected by a bankruptcy court, and thus lessens the amount of litigation on this question. Cf. *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 679 (1981).

The reasons offered by the court below for rejecting the aspect of the Second Circuit standard articulated in *REA Express* do not withstand scrutiny. The court observed first that it may be impossible to predict the success of a reorganization until late in the proceedings (Pet. App. 14a). This criticism misses the point; until it *is* apparent that the business is likely to fail unless the collective bargaining agreement is rejected, a proper accommodation of the policies underlying the labor laws requires that the terms previously bargained for remain in effect. The court also expressed concern that the *Kevin Steel-REA Express* standard "would make it likely

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[14] A bankruptcy court, being unfamiliar with labor law principles and policies and accustomed to focusing only on furthering the policies of the bankruptcy laws, might otherwise tend to authorize rejection of a collective bargaining agreement on a mere showing that it would improve the financial condition of the debtor. See pages 27-28 note 15, *infra*.

that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation" (Pet. App. 15a). The court cites no examples of such an occurrence, and its concern appears to be groundless. If at any point during the reorganization proceedings a debtor-in-possession can show that it is likely to be forced into liquidation, it can then seek rejection of the collective bargaining agreement.

The test adopted by the court below would permit collective bargaining agreements to be rejected far too readily. Under that test, the debtor-in-possession first must show that an agreement is burdensome to the estate; the bankruptcy court then must balance the equities between the employees and the creditors and make a reasoned determination that rejection of the agreement will assist the debtor-in-possession to achieve a satisfactory reorganization (Pet. App. 17a). Under this standard, it appears likely that most collective bargaining agreements could be rejected.[15] Presumably most debtors-in-possession could

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[15] One bankruptcy court that rejected the *REA Express* aspect of the Second Circuit standard and applied the standard adopted by the court below allowed rejection of a collective bargaining agreement despite the fact that there was no contention or evidence that the economic terms of the contract were "too costly to be sustained by the debtor" or that they had contributed to the bankruptcy. The bankruptcy court permitted rejection because the president of the debtor-in-possession, who asserted that a "union free environment is best for my style of management," wanted to be able to escape the seniority provisions of the contract and thus allegedly improve production. The debtor-in-possession had never established objective production criteria, and it did not provide evidence of individual production performance to either the union or the bankruptcy court. Despite the union's acknowledged willingness to bargain about production problems, the court found that use of the contractual grievance procedures to re-

establish that a labor contract imposes some burdens on the estate and deprives it of assets that could be used for other purposes. Under the balancing of equities prescribed by the court below, no special weight is given to collective bargaining interests; instead, interests of creditors are weighed equally with interests of employees.[16] Presumably a court could always conclude that, since creditors must compromise during reorganization, employees, too, should sacrifice. Moreover, rejection of contractual obligations to employees presumably could be said to assist in achieving a satisfactory reorganization in many cases. Such a standard gives insufficient weight to

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solve contentions that particular employees were unproductive would be "burdensome." The court concluded that rejection was proper on the ground that the president of the debtor-in-possession had insisted on making his earlier purchase of the capital stock of the company conditional on rejection of the collective bargaining agreement. *In re Southern Electronics Co.*, 23 Bankr. 348, 359, 361-363 (Bankr. E.D. Tenn. 1982).

[16] The court of appeals indicated (Pet. App. 16a) that one factor to be weighed in a balancing of the equities is the fact that employees could file a claim against the estate for damages resulting from rejection of a collective bargaining agreement. Such a claim would provide no compensation for loss of the numerous nonmonetary rights to which employees are entitled under most collective bargaining agreements. See pages 21-22, *supra*. For example, the agreement in this case included provisions relating to duties of employees, seniority, arbitration of disputes, leave, vacations, and many other aspects of the employer-employee relationship (see J.A. 82-83, 83-85, 92-94, 88-89, 108-111). In addition, recovery of monetary claims is an uncertain proposition, since claims based on rejection are classified as pre-petition claims (see 11 U.S.C. (Supp. V) 365(g)(1)) and are thus part of the class of general unsecured claims. Hence, employees may have little chance of recovering compensation for their lost contractual rights.

the special status of collective bargaining agreements under the NLRA and to the hardships imposed on employees as a result of rejection.

The test adopted by the court below also gives insufficient consideration to Congress' decision that the relationship between labor and management should be resolved through the collective bargaining process. The court below made no reference to the possibility that the bankruptcy court, before entertaining a petition to reject the existing agreement, could require the debtor-in-possession to attempt to reach a new agreement with the union that would preserve rights of employees to the maximum extent possible, while easing some of the financial pressure on the estate.[17] Instead, the court's test allows the bankruptcy court

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[17] Although in some circumstances it may be important for an employer to act quickly in changing the terms under which it operates, its bargaining obligation under the NLRA requires it only to bargain until a genuine impasse exists. In circumstances in which the employer claims a need to change particular terms because of severe financial hardship, the bargaining could well be quite abbreviated. See *Shell Oil Co.*, 149 N.L.R.B. 305, 307 (1964), in which the Board found that a two-day notice and offer to bargain about a proposed transfer of part of an operation in order to realize an economic saving met the employer's bargaining obligation. The Board explained that the amount of time and discussion required to meet the obligation to bargain in good faith may vary with, *inter alia*, "the exigencies of the particular business situation involved." *Ibid.*

One court has suggested that there should be a threshold requirement that the debtor-in-possession attempt to renegotiate the collective bargaining agreement before a rejection application may be made to the bankruptcy court. *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982). See also *In re Brada Miller Freight System, Inc.*, *supra*, slip op. 2362 (suggesting that bankruptcy courts could require such bargaining); Note, *The Labor-Bankruptcy Con-*

to usurp the parties' roles in the collective bargaining process and to decide for itself such questions as whether "it would be in the interests of the workers in a bargaining unit to be afforded the opportunity to continue to work under less generous financial benefits [rather] than to insist upon an absolute payment of vacation benefits, pension, health and welfare benefits, and wage increases" (Pet. App. 18a n.13); and whether the employees are likely to strike if the contract is rejected (*id.* at 16a).[18] Of course, these normally are matters that are best worked out by the parties themselves; given the mutual interest of employer and employees in preservation of the business, it would be unusual for employees to insist on continuation of particular terms if the debtor-in-possession could demonstrate during negotiations that adherence to those terms would cause the business to fail.

3. In *In re Brada Miller Freight System, Inc.*, *supra*, the Eleventh Circuit joined the court below in rejecting the *Kevin Steel-REA Express* test insofar as it requires a threshold showing by the debtor-in-possession that the business is likely to fail

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flict: Rejection of a Debtor's Collective Bargaining Agreement, 80 Mich. L. Rev. 134, 148-152 (1981). The record in this case suggests that the debtor-in-possession made no attempt whatsover to renegotiate the collective bargaining agreement it sought to reject.

[18] The practice of bankruptcy judges of participating in the affairs of the debtor's estate, including negotiation of contracts, was one of the problems Congress sought to avoid in the Bankruptcy Code. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 88-91 (1977). The standard for rejection established by the court below defeats this congressional purpose by needlessly injecting bankruptcy judges into the arena of collective bargaining.

absent rejection of the collective bargaining agreement. The court believed that "[t]o elevate this single consideration to such a dominant and decisive position allows the issue of rejection to be settled without any consideration of the interests of other parties involved, a total abdication of the policies behind the bankruptcy laws" (*Brada Miller, supra,* slip. op. 2360-2361; footnote omitted). However, while the Eleventh Circuit purports to agree with the court below that a "balancing of the equities test provides a more satisfactory accommodation of the conflicting interests at stake in a rejection proceeding" (*id.* at 2360), it acknowledges that "in many instances, the threat of liquidation with its incumbent loss of jobs and default on debts will properly constitute the principal factor in a judge's decision to allow rejection" (*id.* at 2361 n.26).

The factors the *Brada Miller* court cites as relevant to the rejection decision appear to be compatible with the *Kevin Steel-REA Express* standard in most respects. Thus, whether the employer sought "concessions from the unions prior to its attempt to reject the contract" and, if so, "how cooperative was the union" (*Brada Miller, supra,* slip op. 2362) would be relevant to the determination whether the business is likely to fail absent rejection of the collective bargaining agreement. This is because the bankruptcy court is in a better position to decide whether the agreement in fact threatens the survival of the business if it knows the employer's position on which provisions require modification and in what respects, and the union's counterproposals. In addition, when the employer asks the bankruptcy court to authorize rejection of a collective bargaining agreement without first attempting to bargain with

the union over the modifications the employer deems necessary to continuation of the business, the *Kevin Steel-REA Express* test would leave it to "the discretion of the bankruptcy court to require such bargaining" (*Brada Miller, supra*, slip op. 2362). Similarly, in balancing the equities under the *Kevin Steel-REA Express* test, it would be appropriate to consider the "cost-spreading abilities of the parties" (*Brada Miller, supra*, slip. op. 2362) and whether the employer has used "the Section 365 mechanism for the sole purpose of escaping a union contract" (*id.* at 2362-2363).

The only real difference between the *Kevin Steel-REA Express* standard and the *Brada Miller* test appears to be that the former requires a threshold showing that the business is likely to fail unless the collective bargaining agreement is rejected before the bankruptcy court reaches the stage of balancing the equities. As noted above, the threshold requirement is necessary to ensure that the interests of the employees and the policies of the NLRA are not impaired by bankruptcy court nullification of collective bargaining agreements unless demonstrably necessary to accomplish the purposes of the bankruptcy laws; moreover, it is part of the test implicitly adopted by Congress in the 1978 Bankruptcy Code. The Eleventh Circuit's objection to the threshold showing requirement on the ground that it ignores the interests of the other parties to the bankruptcy proceeding is not well taken. As discussed above (pages 21-22), parties to collective bargaining agreements are in very different circumstances from parties to ordinary commercial contracts; the interests of employees, who are likely to be wholly dependent on their jobs, are not com-

parable to those of commercial creditors. In light of the special character of collective bargaining agreements and the unique concerns of the national labor policy, it is entirely appropriate to accord different treatment to rejection of such agreements than to other matters that arise in the course of bankruptcy proceedings. Moreover, the *REA Express* test does accommodate the interests of other creditors and the debtor-in-possession, since it permits rejection if it is necessary to a successful reorganization.

C. The Debtor-In-Possession Stands In The Same Position As The Debtor With Respect To Obligations Under A Collective Bargaining Agreement And Under The Labor Laws

The court below suggested (Pet. App. 12a, 21a-22a) that at least some of the restrictions of the labor laws did not apply here because the debtor-in-possession is a "new entity," different from the debtor, apparently implying that collective bargaining interests weigh less heavily for that reason. However, the "new entity" theory, which was originally advanced by the Second Circuit, is not sound. Under established principles, the debtor-in-possession stands in the same position as the debtor with respect to obligations under a collective bargaining agreement and under the labor laws.

The Second Circuit, in *Kevin Steel*, *supra*, attempted to avoid the apparent conflict between the bankruptcy laws, which permit rejection of executory contracts, and the labor laws, which prohibit unilateral termination of collective bargaining agreements, by holding that the debtor-in-possession is not the same entity as the contracting employer,

but is a new entity with its own rights and duties subject to the supervision of the bankruptcy court. It stated that, "[u]ntil the debtor here assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) to any labor agreement with the union and is simply not subject to the termination restrictions of the section." 519 F.2d at 704. The Second Circuit concluded that unless a debtor-in-possession were treated as a new entity it would be placed in a worse position than a successor employer, which generally is not bound by an existing labor agreement.[19] *Ibid.*

The difficulty with the "new entity" theory advanced by the Second Circuit is that it is internally contradictory. If a debtor-in-possession is a different entity, it presumably is not bound by the debtor's collective bargaining agreement unless it assumes the agreement, so there would be no occasion for the debtor-in-possession to seek rejection in the bankruptcy court—a process that assumes the debtor-in-possession is bound by the contract until the court

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[19] A change in ownership of a business enterprise does not, of itself, relieve the new owner of an obligation to recognize and bargain with the union that represented the predecessor's employees. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281 (1972). Rather, where the new owner continues to operate the business in essentially the same manner, with the predecessor's employees comprising a majority of its work force, it is deemed a successor employer and is obligated to bargain with the incumbent union. However, a successor employer is not required to assume the predecessor's collective bargaining agreement (*id.* at 291), and it is ordinarily free to set initial terms of employment unilaterally (*id.* at 294-296).

permits rejection. See *In re Brada Miller Freight System, Inc., supra*, slip op. 2356.[20] Moreover, as the Eleventh Circuit noted in rejecting the analysis of the Second Circuit, "the new entity theory collides head on with the fact" that "if a bankruptcy court refuses to allow a debtor-in-possession to reject a collective bargaining agreement, the debtor-in-possession is bound retroactively to the agreement from the time of the filing of the petition." *Ibid.*[21]

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[20] The Second Circuit itself has acknowledged this contradiction. In *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 318, 320 (2d Cir. 1976), the court stated:

> Of course, the statement that the debtor is not a "party," and the analogy to the successor employer, cannot be taken literally, since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a party to it.

The court further acknowledged in *Bohack* that its new entity theory was devised only "for the narrow purpose of resolving otherwise conflicting provisions of the labor and bankruptcy laws" (*ibid.*).

The new entity theory has been criticized by commentators. See, *e.g.*, Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement, supra*, 80 Mich. L. Rev. at 141-148; Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 829-830 (1976); Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 Wayne L. Rev. 165, 172-173 (1975). See also *In re Price Chopper Supermarkets, Inc., supra*, 19 Bankr. at 465.

[21] See also *Truck Drivers Local Union No. 807* v. *Bohack Corp., supra*, 541 F.2d at 321 n.15; *In re W.T. Grant Co.*, 620 F.2d 319, 321 (2d Cir.), cert. denied, 446 U.S. 983 (1980); *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); 2 *Collier on Bankruptcy* ¶ 365.03, at 365-22 (L. King 15th ed. 1982).

Nor does the successorship analogy accurately describe the relationship between the debtor-in-possession and the debtor. The successorship doctrine contemplates that a new owner is operating the business for its own benefit. The bankruptcy statute, on the other hand, contemplates that if a reorganization is successful the business ultimately will be continued by the debtor. During the course of the reorganization the business is operated by the debtor-in-possession on the debtor's behalf.[22] As one commentator has stated, "it is difficult to see how a debtor-in-possession can be truly distinct from its former self." Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements As Executory Contracts In Bankruptcy*, 22 Wayne L. Rev. 165, 172-173 (1975). And see *NLRB* v. *Baldwin Locomotive Works*, 128 F.2d 39, 43-44 (3d Cir. 1942) (rejecting the contention that the debtor was not responsible for unfair labor practices committed while the debtor-in-possession was operating the business; "where managerial control and economic interest of the debtor in possession and the reorganized company are the same * * * [i]n no legally significant sense [can] * * * the [debtor] be differentiated from the debtor in possession so far as the employer-employee relationship is concerned").

Moreover, in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Court, in holding that a successor employer is not required to assume the predecessor's collective bargaining agreement, emphasized that the successor had not agreed to assume the agreement and had made clear that it

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[22] Here, petitioner's two general partners remained in control of the business following the filing of the bankruptcy petition. The business remained unchanged, although it was operated on a reduced scale (Pet. App. 3a; J.A. 58-59).

had no intention of doing so (*id.* at 286).[23] The Court concluded that requiring a successor to assume its predecessor's collective bargaining agreement in these circumstances would violate the statutory policy against compelling an employer or union to agree to any particular contractual term (*id.* at 282-284, 287). However, the debtor-in-possession is not a new employer, but rather the same employer as the debtor. Unlike a successor, it has agreed to the collective bargaining agreement; thus, it does no violence to—and indeed preserves—the principle of free collective bargaining to require it to adhere to its bargain.[24] Cf. *Golden*

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[23] The Court in *Burns* contrasted the situation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964), in which an employer that merged with another employer that was a party to a collective bargaining agreement was held to the latter's obligation to arbitrate. The court noted, *inter alia*, that in *Wiley* the "merger occurr[ed] against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation" (406 U.S. at 286).

[24] The collective bargaining agreement between Bildisco and the Union indicates that the parties expected that any successor to Bildisco would assume the obligations under the agreement. Section 21 of the agreement states (J.A. 91-92):

> This agreement shall be binding upon the parties hereto, their successors, administrators, executors, and assigns. In the event an entire operation or any part hereof is sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof. The specific provisions of this contract, excluding supplements or other conditions shall prevail. It is understood by this section that the parties hereto shall not use leasing device to a third party to evade this agreement. The Employer shall give notice of this existence of this agreement to any purchaser, transferee, leasee, assignee,

State Bottling Co. v. *NLRB*, 414 U.S. 168 (1973) (successor that acquires business with knowledge of its predecessor's unfair labor practices is required to remedy them).[25]

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etc., of the operation covered by this agreement, or any part hereof. Such notice shall be in writing with a copy to the Union at the time the seller, transferee, or leasee executes a contract or transaction as herein described. The Union shall also be advised of the exact nature of the transaction, not including financial details. In the event the Employer fails to require the purchaser, transferee, or leasee to assume the obligations on this contract, the Employer, including all partners thereof, shall be liable to the Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this contract, but shall not be liable after the purchaser, transferee, or leasee has agreed to assume the obligations of this contract.

[25] In *Burns Security Services, supra*, 406 U.S. at 287-288, the Court also noted the possibility of "inequities" if a successor employer were required to assume its predecessor's collective bargaining agreement, in that such assumption may make needed "changes impossible and may discourage and inhibit the transfer of capital." To the extent that such considerations dictate that a debtor-in-possession should be permitted under Section 365 of the Bankruptcy Code to reject a collective bargaining agreement, this can be done without resorting to the fiction that a debtor-in-possession's obligations under the NLRA are those of a successor employer.

The successorship analogy, if given full scope, would diminish the debtor-in-possession's obligation to bargain with the union in a manner unnecessary to the furtherance of any bankruptcy policy. Even if a successor is required to bargain with the union, it is ordinarily free to set initial terms of employment unilaterally. See *Burns Security Services, supra*, 406 U.S. at 294-296. Thus, if the debtor-in-possession were a *Burns*-type successor, it could, following rejection, set initial terms of employment without first bargaining with the union. See *REA Express, supra*, 523 F.2d at 170-171. While accom-

The Board has held that a bankruptcy trustee, receiver or debtor-in-possession that continues to operate the business in the same manner as the debtor is not a successor, but rather an alter ego of the debtor.[26] Therefore, it assumes the debtor's obligations under the NLRA to bargain with its employees' bargaining representative, to remedy any pre-petition unfair labor practices, and to adhere to an existing collective bargaining agreement, at least until rejection has been approved by the bankruptcy court. See *I.S.G. Extrusion Toolings, Inc.*, 262 N.L.R.B. No. 7

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modation to the policies of the bankruptcy laws may require that the debtor-in-possession be relieved of a truly onerous collective bargaining agreement, there is no need to relieve it of the duty to bargain with the union before making further changes in existing terms of employment.

[26] The Board generally will find alter ego status "where the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." *Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976). And see *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 259 n.5 (1974) ("alter ego" status "involves a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management"). In concluding that bankruptcy trustees or debtors-in-possession may have the status of alter egos, the Board has explained that a trustee or debtor-in-possession is a "temporary custodian" of the debtor who acts as "guardian of [the debtor's] assets, with full authority to continue the operation of the business and to exercise all powers necessary to the administration of that business." *Marion Simcox, Trustee of Wagner Shipyard*, 178 N.L.R.B. 516, 518 (1969). In cases in which a trustee in bankruptcy operates the business in a substantially different manner from the debtor the Board will not find alter ego status. See *Blazer Corp.*, 236 N.L.R.B. 103 n.1, 109-110 (1978).

(June 11, 1982), slip op. 4-5; *Oxford Structures, Ltd.*, 245 N.L.R.B. 1180, 1181, 1183 (1979); *Century Printing Co.*, 242 N.L.R.B. 659, 669-670 (1979), enforced, 108 L.R.R.M. (BNA) 2279 (3d Cir. 1981); *Airport Limousine Service, Inc.*, 231 N.L.R.B. 932, 934 n.2 (1977); *Jersey Juniors, Inc.*, 230 N.L.R.B. 329, 331-332 (1977); *Marion Simcox, Trustee of Wagner Shipyard*, 178 N.L.R.B. 516, 518 (1969); cf. *Cagle's, Inc.*, 218 N.L.R.B. 603, 604 (1975).

The alter ego principle applied by the Board appropriately implements the statutory provision for coverage of bankruptcy trustees and of any agent of an employer under the NLRA, 29 U.S.C. (& Supp. V) 152(1) and (2). Unlike the theories used by the Second Circuit and the court below, the Board's alter ego principle recognizes the continuity of ownership and the substantially identical positions of the debtor and the debtor-in-possession with respect to the employer-employee relationship (see page 36, *supra*); in addition, it prevents the mere filing of a bankruptcy petition from operating to cut off rights and remedies that employees normally enjoy under the national labor laws. In any event, the new entity and successorship theories do not justify the failure of the court below to adopt a standard for rejection of a collective bargaining agreement that properly respects the interests of employees and the policies of the labor laws in protecting collective bargaining rights.

II. A DEBTOR-IN-POSSESSION NEED NOT SHOW THAT IT HAS COMPLIED WITH THE BARGAINING REQUIREMENTS FOR MIDTERM CONTRACT MODIFICATION CONTAINED IN SECTION 8(d) OF THE NLRA BEFORE OBTAINING BANKRUPTCY COURT AUTHORIZATION TO REJECT A COLLECTIVE BARGAINING AGREEMENT

The Union, petitioner in No. 82-852, agrees that the *Kevin Steel-REA Express* standard is the appropriate one for bankruptcy court rejection of a collective bargaining agreement. However, it contends (82-852 Pet. 7-23) that, as a precondition to obtaining such rejection, the debtor-in-possession must show that it has complied with the bargaining requirements for midterm contract modification contained in Section 8(d) of the NLRA, 29 U.S.C. 158(d). We disagree. First, Section 8(d) does not compel the union party to the agreement to bargain about a midterm modification if it does not wish to do so.[27] Thus, compliance with Section 8(d) procedures may be a futile exercise that a bankrupt employer can ill afford. Second, even if the union wishes to bargain about modification, the elaborate procedure of notices and waiting periods prescribed in Section 8(d) (see page 16 note 7, *supra*) is not well suited to expeditious determination of whether the bankrupt business can survive without some adjustment in the existing contract. Thus, accommodation of the labor laws and the bankruptcy laws appears to require that a debtor-in-possession not be held to strict compliance with Section 8(d) as a precondition to rejection of a collective bargaining agreement. Cf. *REA Express, su-*

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[27] See *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063, 1064 (1973), enforced, 505 F.2d 1302 (5th Cir. 1974), cert. denied, 423 U.S. 826 (1975); *C&S Industries, Inc.*, 158 N.L.R.B. 454, 456-458 (1966).

pra, 523 F.2d at 169 ("When a carrier goes into bankruptcy and does not have the funds to continue operations indefinitely at existing levels and labor costs pending exhaustion of the protracted statutory [Railway Labor Act] procedures for modification of its collective bargaining agreements, § 313(1) [of the Bankruptcy Act] must govern.").

However, the fact that strict adherence to Section 8(d) procedures is inappropriate in the context of bankruptcy proceedings does not mean that the bankruptcy court should not encourage the parties to bargain in such a situation. Indeed, there is every reason to believe that a union normally will be willing to discuss modification of an agreement in cases in which the employer has gone into bankruptcy and informs the union that, absent modification, it intends to seek the bankruptcy court's permission to reject the agreement. First, the union, as the employees' representative, shares the employer's interest in ensuring the preservation of the business; if the business fails, the employees lose their jobs. Accordingly, it is not in the union's interest to insist on the maintenance of contractual terms that demonstrably will cause the business to fail.[28] Second, the bankruptcy

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[28] An employer that contends it is financially unable to meet union contractual demands or that it must receive concessions for financial reasons must, at the union's request, supply information to substantiate its claim. *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). The Court in *Truitt* (*id.* at 152 & n.5) noted that employees who are informed about unsatisfactory business conditions have been willing to abandon demands for increased wages and have even accepted wage decreases in the face of such conditions. And see *First National Maintenance Corp.* v. *NLRB*, *supra*, 452 U.S. at 681 n.19; Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, *supra*, 80 Mich. L. Rev. at 151 & n.87.

law does not provide for partial rejection of a contract.[29] Thus, a union that exercises its right under Section 8(d) to refuse to discuss midterm modifications risks losing the entire collective bargaining agreement, including provisions that have no impact on the employer's economic vitality, as well as those a bankruptcy court may identify as burdensome.

Negotiation of modifications in a collective bargaining agreement also has advantages for the employer, so there are incentives to negotiate on both sides. If a bankruptcy court allows rejection of the agreement, the employer is freed from the provisions it considers burdensome, but it also loses benefits that such an agreement typically affords, particularly the protection of a no-strike clause.[30] See *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982) ("[t]he premature rejection of such a [collective bargaining agreement], without just cause, may result in retaliatory strikes by affected workers"). Moreover, the interests of other parties to the bankruptcy proceedings should be served by the achievement of a solution that is mutually agreeable to the employer and employees and avoids strikes. Thus, it is entirely appropriate for a bankruptcy court to encourage the parties to a collective bargaining agreement to attempt to reach a mutually agreeable solution before authorizing rejection. See pages 29-30 & n.17, *supra*.

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[29] See *In re Klaber Bros., Inc.*, 173 F. Supp. 83, 85 (S.D. N.Y. 1959); *In re David A. Rosow, Inc.*, 9 Bankr. 190, 193 n.5 (Bankr. D. Conn. 1981); 2 *Collier on Bankruptcy* ¶ 365.01[2], at 365-11 (L. King 15th ed. 1982).

[30] A bankruptcy court has no power to enjoin a strike that occurs during the course of a reorganization. See *Truck Drivers Local Union No. 807* v. *Bohack*, *supra*, 541 F.2d at 317-318; *In re Petrusch*, *supra*, 667 F.2d at 298-300.

III. THE NATIONAL LABOR RELATIONS BOARD MAY PROPERLY FIND THAT A DEBTOR-IN-POSSESSION VIOLATES SECTION 8(a)(5) OF THE NLRA BY UNILATERALLY CHANGING THE TERMS OF A COLLECTIVE BARGAINING AGREEMENT DURING THE PERIOD BETWEEN FILING OF A CHAPTER 11 PETITION AND ENTRY OF A COURT ORDER AUTHORIZING REJECTION OF THE AGREEMENT

The court below agreed with the Board that petitioner's unilateral changes in contract terms prior to the filing of its bankruptcy petition violated Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5). However, the court ruled (Pet. App. 26a) that, if on remand the bankruptcy court permits rejection,[31] "the Board will be bound by that determination, which would preclude any post-petition unfair labor practice arising from the rejected agreement."

The court's ruling did not rest on the assumption that the debtor-in-possession is not bound by the strictures of the NLRA.[32] Indeed, the court expressly ac-

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[31] The court set aside the earlier rejection of the collective bargaining agreement because the bankruptcy court had not adequately explained the basis for its action (Pet. App. 18a-20a).

[32] The courts uniformly have held that insolvency or the filing of a bankruptcy petition by an employer does not relieve that employer, any trustee in bankruptcy, or any debtor-in-possession from its statutory duty to employees under the NLRA. See *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 215 (9th Cir. 1980); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1251 (9th Cir. 1979); *Kevin Steel, supra*, 519 F.2d at 704; *NLRB* v. *Coal Creek Coal Co.*, 204 F.2d 579, 580 (10th Cir. 1953); *NLRB* v. *Baldwin Locomotive Works, supra*, 128 F.2d at 43-44. Thus, a debtor-in-possession or trustee in bankruptcy is not insulated from complaints of unfair labor practice violations, either by virtue

knowledged that a debtor-in-possession is required to bargain with the union[33] (Pet. App. 22a). Rather, the court based its conclusion on the theory that the debtor-in-possession is a new entity and that, in any event, rejection of the collective bargaining agreement is retroactive to the filing of the petition.

As we have shown, pages 33-40, *supra*, the new entity theory set forth originally by the Second Circuit in *Kevin Steel*, *supra*, is erroneous and should not be applied here. Even if that theory were accepted for the limited purpose for which it was espoused by the Second Circuit—to permit rejection of collective bargaining agreements—that court has stressed that the bankruptcy laws do not authorize a debtor-in-possession to ignore its obligations under the NLRA. *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, *supra*, 541 F.2d at 320. Here petitioner committed an unfair labor practice by unilaterally altering the terms of the collective bargaining agreement in the post-petition period. The eventual

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of its status as trustee, or because the enterprise in question is involved in bankruptcy proceedings. *In re Tucson Yellow Cab*, 112 L.R.R.M. (BNA) 2705 (Bankr. 9th Cir. 1983); *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981); *In re Shippers Interstate Service, Inc.*, 618 F.2d 9 (7th Cir. 1980); *In re Bel Air Chateau Hospital, Inc.*, *supra*, 611 F.2d at 1250-1251; *NLRB* v. *Autotronics, Inc.*, 434 F.2d 651, 652 (8th Cir. 1970); *Ahrens Aircraft, Inc.* v. *NLRB*, No. 82-1079 (1st Cir. Mar. 28, 1983), slip op. 2-3.

[33] The General Counsel's complaint in this case alleged that petitioner's unilateral abrogation of the collective bargaining agreement violated Section 8(a)(5) of the Act (J.A. 11-12). The complaint issued prior to the ruling of the bankruptcy court permitting rejection of the agreement and was upheld by the Board on summary judgment. The nature of petitioner's obligation to bargain after rejection thus was not addressed by the Board here.

rejection of the agreement by the bankruptcy court would not expunge that unfair labor practice, and the Board therefore should not be precluded from issuing an order remedying the violation.

In support of its conclusion that the bankruptcy court's rejection of the collective bargaining agreement would have retroactive effect, the court below relied (Pet. App. 4a, 24a) on 11 U.S.C. (Supp. V) 365(g)(1), which provides that rejection of an executory contract constitutes a breach of the contract "immediately before the date of the filing of the petition." [34] The court's reliance on that provision is misplaced. Section 365(g)(1) refers only to the priority of claims for damages based on rejection of the contract, not to existence of the contract in the post-petition period. The legislative history confirms that Congress included Section 365(g)(1) to ensure that claims based on rejection of executory contracts would be treated as pre-petition claims, *i.e.*, that they would have the status of general unsecured claims. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 349 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 60 (1978). And see 2 *Collier on Bankruptcy* ¶ 365.08, at 365-40 to 365-41 (L. King 15th ed. 1982) (footnote omitted) (the purpose of Section 365(g)(1) is "to make it clear that, under the doctrine of relation back, the other party to a contract which has not been assumed is simply a general unsecured creditor").[35]

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[34] See also 11 U.S.C. (Supp. V) 502(g), which states that a claim arising from rejection of an executory contract shall be determined "the same as if such claim had arisen before the date of the filing of the petition."

[35] A similar rule applied to claims based on rejection of executory contracts under the old Bankruptcy Act. See 14 *Collier on Bankruptcy* ¶ 11-53.04[4], at 11-53-16 to 11-53-18 (J. Moore & L. King 14th ed. 1976).

It is well established that contractual obligations of a debtor continue to exist in the period following the filing of a reorganization petition. Thus, under the bankruptcy law, an executory contract, including a collective bargaining agreement, remains in force until rejected. 2 Collier *on Bankruptcy, supra*, ¶ 365.03, at 365-22. See *In re W.T. Grant Co., supra*, 620 F.2d at 321 ("only a formal rejection pursuant to § 313(1) of the Bankruptcy Act, * * * is sufficient to disaffirm an executory contract"); *In re Smith Jones, Inc.*, 17 Bankr. 126, 128 (Bankr. D. Minn. 1981) ("The debtor absent * * * repudiation or rejection must in order to enjoy the benefits of the agreement comply with its terms except in the case of [the] most exigent circumstances."). As the court stated in *Truck Drivers Local Union No. 807* v. *Bohack Corp., supra*, 541 F.2d at 321 n.15: "If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI. But like any other unilateral breach of contract, it does not destroy the contract * * *."[36]

Deeming the rejection of a collective bargaining agreement to be retroactive to the date of filing of the petition for purposes of determining unfair labor practice liability is unnecessary to furtherance of the policy of the Bankruptcy Code. That policy requires that debtors be allowed to reject collective bargaining agreements in appropriate circumstances following a proper showing in the bankruptcy court and a court order authorizing rejection. Effectuation of the policy

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[36] See also *In re W.T. Grant Co., supra*, 620 F.2d at 321; *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972).

does not require that the debtor-in-possession be permitted to act unilaterally prior to approval of rejection by the bankruptcy court. The position of the court below would sanction the debtor-in-possession's unilateral modification during the post-petition period so long as it correctly anticipated that rejection eventually would be allowed.[37] Nothing in the bankruptcy laws requires such a result.

Furthermore, the conclusion of the court below disserves the interests of employees that are protected by the NLRA. If rejection operates retroactively to wipe out the existence of a collective bargaining agreement in the period subsequent to filing of the bankruptcy petition, employees are placed in a wholly untenable position. Most employees have only their own time and skills as a source of livelihood. Ordinarily they have the option of seeking alternative employment if they are unwilling to provide services under existing contractual terms. But if rejection can operate to nullify those terms retroactively, employees could lose benefits for a period during which they worked in reliance on contractual entitlement to receive them. At the same time, debtors-in-possession would be encouraged to disregard contractual obligations long before it becomes clear that they will be

[37] Of course, since the debtor-in-possession is the party that moves for rejection of the contract before the bankruptcy court, it could control the duration of the period in which it would be free to engage in unfair labor practices under the holding of the court below. See *Brada Miller*, *supra*, slip op. 2356 n.16. The debtor-in-possession in this case began to ignore its obligations under the collective bargaining agreement even prior to filing of a bankruptcy petition. It did not apply to the bankruptcy court for approval of rejection of the agreement until some eight months after the petition was filed. See pages 5-6, *supra*.

entitled to reject an agreement. Moreover, the expectation that rejection will be retroactive would remove an important incentive for the debtor-in-possession to negotiate with the union to obtain a modification of the agreement that would preserve some employee rights before taking the drastic step of repudiating it.

Finally, the court of appeals' holding seriously impairs the Board's unique ability to protect the employees' collective bargaining rights during reorganization proceedings by issuing orders directed at unfair labor practices committed in the course of those proceedings. Such orders can operate to deter unilateral alterations in the terms of a collective bargaining agreement and also to aid employees in recovering compensation for benefits due under the agreement.[38] In a period of numerous bankruptcies, it is particularly important that the Board not be precluded from exercising its statutory responsibilities "to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952).

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[38] A Board claim for payment of wages and other benefits owing for the period of Chapter 11 operations is a claim for costs of administration and thus would receive priority in payment from the estate. See *In re Bel Air Chateau Hospital, Inc.*, 106 L.R.R.M. (BNA) 2834, 2835 (C.D. Cal. 1980). Cf. *Reading Co.* v. *Brown*, 391 U.S. 471 (1968). In contrast, claims based on rejection of an executory contract are treated as pre-petition claims under 11 U.S.C. (Supp. V) 365(g)(1) and thus join the class of general unsecured claims. If a subsequent rejection of a collective bargaining agreement by the bankruptcy court were to strip the Board of power to remedy post-petition unfair labor practices previously committed by the debtor-in-possession, unsecured creditors would obtain a windfall at the expense of the employees, who have been working for the benefit of the creditors throughout the post-petition period.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1983

U. S. GOVERNMENT PRINTING OFFICE, 1983 405717 1343